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APR 1
JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 871

BEULAH WEIL,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Beulah Weil respectfully shows:

Beulah Weil, the petitioner in the above entitled application, prays that a Writ of Certiorari may issue to review that part of a judgment of the United States Court of Appeals for the Second Circuit (Record, pp. 151a-156a)

which unanimously reversed in part a judgment of the Tax Court of the United States. The petitioner is a citizen of the State of New York.

Conflict among the Circuits in the interpretation of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939 is urged as a ground for review.

(a) Opinions Below

The opinion of the Tax Court appears at page 12a of the Record and is reported in 22 T. C. 612. A supplemental opinion appears at page 34a and is reported in 23 T. C. 630. Additional supplemental memorandum findings of fact and a further supplemental opinion (which have not been officially reported) appear at pages 40a and 117a of the Record.

The opinion of the United States Court of Appeals for the Second Circuit (Medina, C. J.), not yet officially reported, appears at pages 142a-150a of the Record and is printed, *infra*, in Appendix B, pages 16-23.

(b) Jurisdiction

The jurisdiction of this Court is invoked under C. 646, 62 Stat. 928; 28 U.S.C.A. 1254, Act of June 25, 1948. The decision of the Court of Appeals for the Second Circuit, here in part sought to be reviewed, is dated January 22, 1957, and judgment was entered on that day. This application is therefore timely.

(c) Questions Presented

Review is sought of the judgment of the Court of Appeals in so far as said judgment reversed a decree of the

Tax Court of the United States which had adjudged that certain payments made by the petitioner's former husband to her in the year 1947, under a separation agreement incident to a decree of divorce, were for the support of the husband's minor children, and were consequently neither includible in the petitioner's gross income nor deductible by the husband from his reported gross income.

The questions presented are:

(1) Was the United States Court of Appeals for the Second Circuit in error in holding that, in the absence of a formal provision in the separation agreement that certain sums were "required" to be used by petitioner for the support of minor children, such sums were reportable as part of her gross income and were deductible from his reported gross income by her former husband within the meaning of the applicable tax statutes?

(2) Was the United States Court of Appeals for the Second Circuit in error in holding that sums were not payable for the support of minor children, within the meaning of the applicable tax statutes, unless the separation agreement provided that petitioner had no beneficial interest, contingent or direct, in such sums?

(3) Did the United States Court of Appeals for the Second Circuit err in holding that the separation agreement of the parties did not, within the meaning of the applicable tax statutes, "specifically designate" any sum which was "payable for the support of minor children"?

(4) Did the Court of Appeals for the Second Circuit err in holding that no part of the sums payable to the petitioner under the separation agreement was payable for the support of minor children, within the meaning of the applicable tax statutes?

(5) Are the decisions of the Courts of Appeal for the Sixth and Seventh Circuits and of the Tax Court of the United States in error which hold that sums are payable for the support of minor children, within the meaning of the applicable tax statutes, notwithstanding that no express apportionment is made between the sums payable for the support of the wife and those payable for the support of minor children, provided that the amount of such apportionment may reasonably be found or inferred from a reading as a whole of the separation agreement of the parties?

(d) The Statutes Involved

The questions presented involve the construction of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939 (26 U.S.C.A., Sections 22(k) and 23(u)), as amended by Section 120 of the Revenue Act of 1942, c. 619, 56 stat. 798, 816 and of Treasury Regulation 111, Sec. 29.22(k)-1, subd. (d) and Sec. 29.23(u)-1, promulgated under the Internal Revenue Code of 1939, as amended. These statutes and regulations are printed in Appendix A, *infra*, pages 13-15.

These sections of the Statute were reenacted by Congress in 1954 (Internal Revenue Code of 1954, Sections 71 and 215 and proposed Treasury Regulations 1.71-1(e) and 1.215-1a, printed in Appendix C, *infra*, pp. 24-26) with but one change not here pertinent and they are still in effect.

(e) Statement

The proceedings in the Tax Court and in the United States Court of Appeals for the Second Circuit were consolidated proceedings and related to the respective tax

liabilities of the petitioner, Beulah Weil, and her former husband, Charles Weil. They turned on the construction of a separation agreement entered into by them in 1940, incident to a decree of divorce. The tax year 1947 was involved with respect to the petitioner, and the tax years 1947 and 1948, with respect to her former husband, Charles Weil.

Charles and Beulah Weil were married in 1928 and had two sons who were 19 and 17 years of age in 1947 (Record, p. 73a). Both children were unmarried minors and resided with the petitioner, Beulah Weil, throughout 1947 and 1948 (Record, p. 73a).

The separation agreement is printed in full at pages 120a-141a of the Record. In paragraph Thirteenth of the agreement (pp. 129a, 131a) Charles Weil agreed to pay to the petitioner the sum of $9,600 per annum in equal monthly installments as long as his income was between $18,000 and $24,000 a year. A formula was provided to cover the circumstances of a greater or a lesser income to the husband and the agreement provides that in no event shall Charles Weil pay more than $12,000 or less than $5,000 per annum (p. 132a).

The agreement is clear that the amounts were payable not only for the support of the wife but also for the support of the two minor children. A basis for dollar apportionment between the wife's alimony and the childrens' support appears at various points in the agreement, although no specific apportionment is expressly made. Paragraph Fourteenth thereof (pp. 135a-137a) provides that upon the remarriage of the wife the husband's obligations under paragraph Thirteenth shall cease and thereafter he shall be required to pay to the wife $400 a month "for the support, maintenance and education of the children * * * so long as such children shall continue to reside with said Wife". "In the event of the death

or marriage of either child, or in the event either child no longer resides with the Wife", said sum of $400 shall be reduced by the sum of $200 per month with respect to each such child who dies, marries or no longer resides with the wife.

The agreement provides for additional payments respecting education of the children, summer camps and dental or medical treatment, under certain conditions, but these are not pertinent here.

It will be noted that there are numerous indicia in the agreement which point to the intent that 50% of the sums payable to the wife under the agreement were payable for the support of the minor children. (We refer for example, to paragraphs Twelfth, Thirteenth (j) and Sixteenth (c), at pp. 128a, 135a, and 138a.)

In the Court of Appeals the husband contended that, unless the wife remarry, paragraph Thirteenth (j) of the agreement (p. 135a) provides for no reduction of payments to the wife in the event of the death of either child or in the event that either child no longer lived with the wife. But it is to be noted that this is subject to a special proviso which is consistent with the intention that 50% of the sums payable were for the support of the children. The Tax Court, in reading the agreement as a whole, held that, within the purview of the applicable tax statutes above cited, the reduction of payments in the event of remarriage of the wife, considered together with the indicia in the agreement that prior to her remarriage it was intended that 50% of the sums payable were payable for the support of the minor children, authorized the inclusion in the wife's gross income for the year 1947 of 50% of the sums which the husband was obligated to pay to her and similarly precluded the husband from deducting the entire amount of the payments made by him in his returns for the years 1947 and 1948, limiting him to the same formula.

In both the Tax Court and the Court of Appeals, the Commissioner of Internal Revenue supported the contention of the petitioner, Beulah Weil.

The Court of Appeals, in its reversal of that portion of the Tax Court determination here in issue, disagreed with numerous decisions of the Tax Court, stating that they have proceeded upon an "erroneous" interpretation of the statutes above referred to, and held that sums are not "payable for the support of minor children" unless their use is "restricted to that purpose, and the wife must have no independent beneficial interest therein" (Appendix B, p. 21, *infra*).

(f) Basis for Jurisdiction of the Tax Court and the Court of Appeals

The proceedings herein were originally commenced in the Tax Court of the United States pursuant to Sections 272 and 1101 of the Internal Revenue Code of 1939, 26 U.S.C.A. The Commissioner of Internal Revenue had sent a deficiency letter to the petitioner, Beulah Weil, with respect to her 1947 tax return and within 90 days thereafter she filed a petition for review by the Tax Court. So, too, with respect to the petitioner, Beulah Weil's former husband, Charles Weil. Jurisdiction was conferred on the Court of Appeals for the Second Circuit by Section 7482 of the Internal Revenue Code of 1954.

(g) Reasons for Granting the Writ

It is respectfully submitted that this application for a writ of certiorari should be granted for special and important reasons, among which are the following:

I

The decision of the Court of Appeals for the Second Circuit is in conflict with the decisions of *Mandel* v. *Commissioner*, 185 F. 2d 50 (C. A. 7th—1950) and *Budd* v. *Commissioner*, 177 F. 2d 198 (C.C.A. 6th—1947).

In *Mandel* v. *Commissioner, supra,* the husband, by agreement, was obligated to pay to the wife $18,000 a year for the support of herself and two minor children. Except in the remarriage provision of the agreement no part of the total sum payable was earmarked for the support of the children. The agreement provided that in the event of remarriage of the wife, the monthly payments by the husband to her should be reduced to $833.33 per month and that, "in the event of the death of a child the monthly payments to the wife should be reduced $416.66 for each child so dying". The Court (C. A. 7th) wrote at page 52:

> "We agree with the Commissioner that there is no reason for concluding that the statutes should be construed liberally in the husband's favor as against the wife."

No provision of the agreement stated that any portion of the sums were "required" be used for the children or that the wife had no "beneficial interest" in the payments. (This argument was specifically raised and considered by the Tax Court. See 8 TCM 445.) In fact the words "payable for the support of minor children" are nowhere to be found in that agreement. This decision, interpreting the agreement and applying the tax statutes and regulations above quoted, is directly in conflict with the determination in the case at bar of the Court of Appeals for the Second Circuit.

So, too, in *Budd* v. *Commissioner* (C.C.A. 6th), *supra,* affirming 7 T. C. 413, where $500 a month was payable to

the wife for her support and the support of a minor child, without any apportionment of such sum, except that the agreement provided that should the wife remarry, the payment for the support of the child from and after such remarriage should be $200 a month. There, too, there was no specific provision in the agreement which "required" the wife to account as to the use of the moneys received by her; there was no provision that the sum found to be payable for the support of the minor child was "required" to be used by her solely for that purpose and no provision of the agreement precluded the wife's "beneficial interest" in the entire sum paid to her.

II

The decision of the Court of Appeals for the Second Circuit is in conflict with numerous decisions of the United States Tax Court.

Judge Medina, writing for the Court of Appeals for the Second Circuit, disapproved of numerous Tax Court decisions which have held to the same effect as the Sixth and Seventh Circuits, writing (Appendix B, *infra*, p. 21) that:

> "the Tax Court has, in a series of cases culminating in the case at bar, adopted the position that it is enough if anywhere in the instrument there is mentioned a sum thought to be appropriate for the support of minor children under some circumstances."

He referred to this as an "erroneous principle" emerging from the cases and wrote that sums payable to the wife are taxable to her unless the separation agreement provides that the sums payable for minor children "are to be used for that purpose only"; that "if sums are to be considered 'payable for the support of minor children', their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein," and that only such sums are not taxed to her which, by the agreement, the wife

"is required to devote exclusively to the support of the children" (Appendix B, *infra*, pp. 25-26).

Among the Tax Court decisions, apparently considered by and which differ with the Court of Appeals decision in the case at bar are:

Estate of Dorothy R. Hirshon, 27 T. C. no. 62, decided December 21, 1946;
Saxe Perry Gantz, 23 T. C. 576;
Harold M. Fleming, 14 T. C. 1308;
Warren Leslie, Jr., 10 T. C. 807;
Hicks v. *Commissioner*, 12 T.C.M. 700;
Swallen v. *Commissioner*, 10 T.C.M. 475.

The result is that a conflict now exists between the Court of Appeals for the Second Circuit on the one hand and the Courts of Appeal for the Sixth and Seventh Circuits and the United States Tax Court, on the other.

III

The Court of Appeals for the Second Circuit has misconstrued the applicable provisions of the Internal Revenue Code.

When Congress enacted the Revenue Act of 1954, revision was made of numerous sections of the 1939 Internal Revenue Code. However, sections 22(k) and 23(u) were reenacted by the Legislature without change except for a single modification not here pertinent.*

It will be noted that the language of sections 71 and 215 of the Internal Revenue Code of 1954, still in effect, and of the proposed regulations to be promulgated thereunder, is identical, so far as is here pertinent, to that of the 1939 Code. Congress at the time of the 1954 enactment is

* The single modification was the removal of the limitation that a separation agreement, to come within the scope of the statute, must be incident to a matrimonial decree.

deemed to have been cognizant of the numerous Tax Court decisions to which Judge Medina refers and with which he disagrees in his opinion for the Court of Appeals of the Second Circuit. *Mandel* v. *Commissioner,* was decided by the Seventh Circuit on November 2, 1950. *Budd* v. *Commissioner,* was decided by the Sixth Circuit on May 5, 1947. Where a statute is reenacted without modification, following extensive judicial interpretation thereof, the Legislature is presumed to have been cognizant of such judicial interpretation at the time of reenactment and such judicial interpretation is deemed to be in accord with legislative intent. (*Hecht* v. *Malbey,* 265 U. S. 144, 153; *Heald* v. *District of Columbia,* 254 U. S. 20, 23; *Latimer* v. *United States,* 223 U. S. 501, 504; *Kepner* v. *United States,* 195 U. S. 100, 124.)

IV

The Court of Appeals for the Second Circuit, in its interpretation of the applicable provisions of the Internal Revenue Code, has decided an important question of federal law which has not, but should be, settled by the Supreme Court of the United States.

V

A determination by the United States Supreme Court of the issues herein will resolve doubts created by the decision of the Court of Appeals for the Second Circuit upon the terms and provisions of and the consequent tax liability respecting numerous separation agreements and decrees presently in effect and which will continue to be made in the future.

The question is an important one which, I respectfully submit, should be decided by this Court.

The Court of Appeals for the Second Circuit has seen fit to challenge the validity of a series of interpretative decisions of the Tax Court of the United States and of

the Courts of Appeal for the Sixth and Seventh Circuits. This Court may take judicial notice of the fact that over the years numerous separation agreements containing similar provisions have been executed. As recently as December 21, 1956, the Tax Court, in *Estate of Dorothy R. Hirshon,* 27 T. C. no. 62, considered a separation agreement which contained support provisions similar to those at bar and held that even though, under certain conditions provided in that agreement, the wife would continue to receive the full sum provided for, the reduction of the payments upon her remarriage together with other indicia in the agreement were sufficient to constitute a portion of the payments as payable for support of the child. The Court wrote:

> "We must read the instrument as a whole, and, reading it as a whole, we think it plain that a portion of the $12,000, namely $3,600, was intended for the support of Wendy, notwithstanding possible conditions subsequent that might convert the entire $12,000 into alimony."

A determination by the Supreme Court of the questions here in issue will serve a salutary purpose both for taxpayers and members of the Bar generally throughout the United States. Moreover, it will aid the Internal Revenue Service and the Courts in applying a uniform policy toward the tax treatment of payments intended for the support of minor children pursuant to matrimonial agreements or decrees.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y., March 20, 1957.

EUGENE L. BONDY,
Attorney for Petitioner,
Beulah Weil.

Appendix A

Statute and Regulations Involved

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(k) [as added by Section 120, Revenue Act of 1942. c. 619, 56 Stat. 798] *Alimony, etc., Income.*— In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

* * * * *

Appendix A

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(u) [as added by Section 120, Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*

* * * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband

is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

* * * * *

SEC. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable years and required to be included in the income of the payee wife or former wife, as the case may be, under section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22(k)-1. (For definition of husband and wife in such cases, see section 3797(a)(1).)

* * * * *

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 10, 11 and 12—October Term, 1956.

(Argued November 8, 1956 Decided January 22, 1957.)

Docket Nos. 23992, 23993, 23994

Before:

MEDINA, LUMBARD and WATERMAN,
Circuit Judges.

Petitions to review decisions of the Tax Court of the United States, Harron, *Judge*. Reported 22 T. C. 612 and 23 T. C. 630. Affirmed as to insurance premiums; reversed as to the payments claimed to have been made "for the support of minor children."

AMEN, GANS, WEISMAN & BUTLER, New York City (Hiram S. Gans and Milton H. Reuben, New York City, of Counsel), *for petitioners-appellants Weil.*

CHARLES K. RICE, Assistant Attorney General, Lee A. Jackson, Harry Baum and David O. Walter, Attorneys, Department of Justice, Washington, D. C., *for Commissioner of Internal Revenue.*

BONDY & SCHLOSS and CHARLES KURZ, New York City (Eugene L. Bondy, Charles Kurz and Bertram Braufman, New York City, of Counsel), *for respondent Beulah Weil.*

Appendix B

MEDINA, *Circuit Judge:*

These cases are before us on petitions for review of the decisions of the Tax Court. The findings of fact and conclusions of law are reported at 22 T. C. 612; a supplemental opinion is reported at 23 T. C. 630; additional supplemental memorandum findings of fact and a further supplemental opinion are not reported.

Charles and Beulah Weil in 1940 entered into a separation agreement incident to a divorce. Under this agreement the husband became obligated to make certain periodic payments to the wife, and to pay the premiums on certain life insurance policies of which she was the primary beneficiary. The problem is the extent to which payments made pursuant to this agreement in the taxable years 1947 and 1948 are includible in the wife's taxable income rather than the husband's, by virtue of Sections 22(k) and 23(u) of the Internal Revenue Code of 1939, 26 U. S. C. A. Sections 22(k) and 23(u).[1] Two questions must be answered:

---

[1] "Section 22 * * * (k) Alimony, Etc., Income.—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support."

Appendix B

(1) Were the insurance premium payments "received" by the wife?

(2) Do "the terms of the * * * instrument fix [a portion of the payments to the wife] as a sum which is payable for the support of minor children of such husband"?

"Section 23. In computing net income there shall be allowed as deductions:

* * * * *

(u) Alimony, Etc., Payments.—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection."

Regulation 111, Section 29.22(k)-1 reads, in part:

"Payments for support of minor children.—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband is by terms of the decree required to pay $200 a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22(k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22(k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated."

Appendix B

I.

By Article 12 of the agreement the husband undertook to deliver certain insurance policies to the wife, who agreed she would "promptly put said policies in a safe deposit box for safe keeping," and he further undertook to continue to pay the premiums. The agreement provided that the wife was to cease to have any interest in the policies if she remarried during his lifetime, and that she was to receive only half of the benefits if she remarried after his death. It also recited that, "The Husband agrees that he will not assign, transfer or encumber said policies or any of them and that he will not surrender or in any other manner change the benefits or terms of said policies during the lifetime of the Wife or until her remarriage, without her written consent." Although the policies provided that no assignment was to be binding unless in writing and filed with the company, the husband did not execute any written assignment.

The husband contends: (1) that he may deduct premiums paid pursuant to the agreement, if the policies were assigned to his former wife; (2) that an assignment of insurance policies may be accomplished by delivery; and (3) that he did so assign the policies. Assuming *arguendo* that his first two contentions are correct, we must nevertheless reject his conclusion, because we find that he did not assign the policies. They were delivered to the wife only "for safe keeping." She had no right to change the beneficiary, to assign the policies, or to obtain the cash surrender values. Her interest ceased upon her death or remarriage during his lifetime. While certain restrictions were placed upon the husband's control of the policies, he clearly retained ownership. The Tax Court was correct in refusing to treat the premium payments as constructively received by the wife.

Appendix B

II.

Prior to the Revenue Act of 1942, alimony was not treated as part of the wife's taxable income. By Section 120 of that Act, however, certain alimony payments were included in her gross income and the husband was allowed an equivalent deduction. 56 Stat. 798, 816. But the statute excepts from its coverage that part of such payments "which the terms of the decree or written instrument fix • • • as a sum which is payable for the support of minor children."

The Tax Court has held that the terms of the agreement now before us did "fix" a part of the payments to be made by the husband thereunder as sums "payable for the support of minor children." We disagree.

The cases construing and applying the terms of the statute have been numerous. In the bewildering maze of different types of separation agreements, containing a great variety of clauses requiring payments to the wife for her own maintenance and for the support of minor children, the Tax Court seems gradually to have drifted into a series of decisions, including the one at bar, which conclude that a particular agreement does "fix" sums "payable for the support of minor children," when it plainly does not.

The key words of the statute are "payable for." The context of Section 22 demonstrates that the Congress used this phrase advisedly. The wife is not relieved of taxability on sums which she in fact expends for the support of minor children, but only on such sums as "the terms of the • • • instrument fix • • • as • • • payable for" that purpose. The statute taxes to the wife sums which are available for her own use or benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the

support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be "payable for the support of minor children," even though the wife may be free to use them for other purposes.

Despite two decisions seemingly to the contrary, *Henrietta S. Seltzer*, 22 T. C. 203, and *Dorothy Newcombe*, 10 T. C. M. 152, aff'd on another point, 9 Cir., 203 F. 2d 128, the Tax Court has, in a series of cases culminating in the case at bar, adopted the position that it is enough if anywhere in the instrument there is mentioned a sum thought to be appropriate for the support of minor children under some circumstances. This erroneous principle emerges from the cases, although they do not articulate any basis for distinguishing between sums "payable for the support of minor children" and sums not so payable. Rather, they proceed upon the false assumption that, whenever sums are to be paid for the support of both the wife and the children, some portion must be "payable for" the children, and that it is the duty of the court to go over the instrument with a fine-tooth comb to discover a figure which might be used as the basis for a division of the tax burden. That such was the approach of the Tax Court in this case appears unmistakably from a reading of its opinion. See 22 T. C. 612.

We hold that sums are "payable for the support of minor children" when they are to be used for that purpose only. Accordingly, if sums are to be considered "payable for the support of minor children," their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children. The fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband.

Appendix B

We now turn to the agreement to see whether, in the light of the principles just stated, its terms fix any amount as payable for the support of minor children.

Article 5 provides that, "So long as she receives the payments herein provided for, the Wife agrees to live with and properly maintain, care for and educate the children." In Article 8 she agrees to "accept the provisions herein made for her in full payment and satisfaction of all obligations of the Husband for her support and maintenance, and for the support, education and maintenance of the children * * *." Article 13 states that "the Husband shall pay the sums as provided in this Article in full payment of any and all obligations of the Husband to support, maintain and care for the Wife and the children of the parties." We think it plain that the wife undertook the obligation of supporting the children as part of the consideration on her part and that the husband undertook to make payments to the wife as part of the consideration on his. In these circumstances one would not expect to find in the agreement any requirement that the wife devote a particular portion of the payments to the support of the children; and there is none.

Except in the remarriage clause, the agreement nowhere requires the wife to devote any specified amount to the support of the children, nor, unless she remarries, are the payments to her to be reduced if it becomes no longer necessary for her to support either or both of the children. On the contrary, it is specifically provided in Article 13(j) that "There shall be no revision in the payments herein provided for to be made to the Wife by reason of the death or majority of the children or either of them or by reason of the fact that they then no longer reside with the Wife * * *."

We agree with the statement of the Commissioner in his brief that in order to sustain the determination of the

Tax Court it is necessary to find in the agreement "sufficient provisions showing an intention on the part of Charles Weil to provide for his minor children specifically, as distinct from an intention to provide for his former wife and have her in turn provide for the children." But we are convinced that the agreement contains no such provisions. It is quite true that the agreement must be read as a whole, *Mandel* v. *Commissioner*, 7 Cir., 185 F. 2d 50; *Budd* v. *Commissioner*, 6 Cir., 177 F. 2d 198, and that no particular formula, such as the phraseology we have quoted from Section 22(k), is necessary. This particular instrument, however, must be construed as expressing the husband's intention to make payments to the wife and have her support the children, the very converse of what the Commissioner states is necessary to support the orders of the Tax Court in these cases.

The provisions of the agreement relied on by the Tax Court are fully described in its opinion, reported at 22 T. C. 612. In our view they do not bear on the question of what portion, if any, of the payments was "specifically designated" as "payable for the support of minor children."

The decision of the Tax Court is affirmed insofar as it relates to the insurance premiums paid by the husband, and reversed as to the payments claimed to have been made pursuant to the terms of an agreement fixing a sum payable for the support of minor children.

Appendix C

INTERNAL REVENUE CODE OF 1954:

Sec. 71. (a) GENERAL RULE—

(1) *Decree of Divorce or Separate Maintenance*—If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

(2) *Written Separation Agreement*—If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

(3) *Decree for Support*—If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

(b) *Payments to Support Minor Children*—Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

• • •

Sec. 215. (a) *General Rule*—In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

PROPOSED TREASURY REGULATIONS UNDER INTERNAL REVENUE CODE OF 1954

Reg. 1.71-1 (e) *Payments for support of minor children.* Section 71(a) does not apply to that part of any periodic payment which, by the terms of the decree, instrument, or agreement under section 71(a), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a

payment for such support. For example, if the husband is by terms of the decree, instrument or agreement required to pay $200 a month to his divorced wife, $100 of which is designated by the decree, instrument, or agreement to be for the support of their minor children and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 71(a). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 71(a) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

Reg. 1.215-1. *Periodic alimony, etc., payments.* (a) A deduction is allowable under section 215 with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 71. As to the amounts required to be included in the income of such wife or former wife, see section 71 and the regulations thereunder. For definition of husband and wife in such cases, see section 7701 (a) (17).

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 871

BEULAH WEIL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 12a–33a) are reported at 22 T. C. 612. A supplemental opinion (R. 34a–39a) is reported at 23 T. C. 630. Additional supplemental memorandum, findings of fact, and supplemental opinion (R. 117a–120a) are not officially reported. The opinion of the Court of Appeals (Pet. App. 16–23; R. 142a–150a) is reported at 240 F. 2d 584.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1957. (R. 155a.) The petition for a writ of certiorari was filed on April 1, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals erred in construing a separation agreement as not fixing a portion of periodic payments made by the husband to his former wife as a sum payable for the support of minor children of the husband, within the meaning of Section 22 (k) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Sections 22 (k) and 23 (u) of the Internal Revenue Code of 1939. These and Sections 29.22 (k)–1 (d) and 29.23 (u)–1 of Treasury Regulations 111 are printed in the Appendix, *infra*, pp. 13–15.

STATEMENT

Charles Weil and Beulah Weil entered into a separation agreement in 1940, incident to a decree of divorce. They had two sons who were 19 and 17 years of age at the end of 1947, the taxable year here involved. (R. 16a.) In 1947, pursuant to the separation agreement, Charles was obligated to pay Beulah $12,000 in periodic payments. (R. 23a.) The Tax Court held that 50 per cent of this amount was payable for the support of the minor children. (R. 31a.) The Court of Appeals reversed, holding that no portion of the payments was fixed by the agreement as a sum payable for the support of the minor children. (R. 147a–150a.)

The agreement is lengthy, and is set out in full in the record. (R. 120a–139a.)

The introductory paragraph sets out that the parties desire to enter into an agreement under which they may continue to live separate and apart (R. 121a)—

> * * * and under which provision shall be made for the support of the Wife and for the maintenance, support, education and custody of the children.

Article Third provides in part that in case of divorce this agreement (R. 122a)—

> * * * shall be in full satisfaction, payment and discharge of any and all alimony pendente lite, alimony, counsel fees, legal fees, costs and disbursements, maintenance and support and all other claims and demands whatsoever that might be or could be made by the Wife for herself or by or for the children of the parties against the Husband for any cause whatsoever * * *.

Article Fifth sets out the control of the husband over the children (R. 123a)—

> The Wife is hereby granted the custody of the children but the Husband shall retain his position as head of the family with such control over the support, maintenance, place of residence, religion and education of the children as is hereinafter provided. So long as she receives the payments herein provided for, the Wife agrees to live with and properly maintain, care for and educate the children.

Then follow provisions concerning the right of visitation and the right of the husband to take the chil-

dren on vacation trips. Article Sixth relates to the religion of the children. (R. 124a–125a.)

Article Seventh, referred to by the Tax Court as showing separability of the payments (R. 29a), reads as follows (R. 125a):

> In no event shall the Wife or either of the children, or any representative of any of them, have any right or power whatsoever to anticipate any payment or payments herein agreed to be made, or to assign or incumber in any way any rights or interests which either of them have or may have by reason of this agreement.

In Articles Eighth and Ninth the wife agreed to accept the provisions made in the agreement (R. 125a)—

> * * * in full payment and satisfaction of all obligations of the Husband for her support and maintenance, and for the support, education and maintenance of the children * * *

and agreed not to contract any debts for which the husband might be liable. If he should in fact pay any such debt he could deduct the amount from sums due to the wife. (R. 125a–126a.)

Article Thirteenth reads in part as follows (R. 129a):

> The Husband represents that because his "net income" (as hereinafter defined) for the year 1939 was in excess of $20,000, he hereby has agreed to make, only during the term of the joint natural lives of the Husband and Wife, and the Wife hereby agrees to accept, the provisions and payments set forth in this Article "Thirteenth" in lieu of and in full payment,

satisfaction and discharge of all obligations of the Husband for the support, maintenance and education of the children, provided also, however, that the provisions of this Article "Thirteenth" shall not be effective after the remarriage of the Wife, whether such remarriage be valid or not. Upon such remarriage of the Wife, the provisions of this Article shall be superseded and replaced by the provisions of Article "Fourteenth" hereof. So long as the Wife shall attempt in good faith to observe and fulfill the provisions of this agreement on her part to be performed, and during the natural life of the Husband, the Husband shall pay the sums as provided in this Article in full payment of any and all obligations of the Husband to support, maintain and care for the Wife and the children of the parties.

Then follow definitions of "net income." Subparagraph (d) then provides (R. 131a):

(d) On each of the first days of September, October, November, and December, 1940, the Husband shall pay the sum of $800 for the support, maintenance and care of the Wife and children for that month. So long as said "net income" of the Husband shall be at least $18,000 and not more than $24,000 per annum, the Husband will pay the Wife for the support and maintenance of the Wife and the support, maintenance and education of the children, the sum of $9,600 per annum, in equal monthly instalments, on or before the 1st day of each month beginning on the 1st day of January, 1941.

Subparagraph (e) provides for adjusting the payments downward or upward as the husband's net income for the preceding year fell below $18,000 or exceeded $24,000, to a minimum payment of $5,000 or a maximum payment of $12,000. Subparagraph (g) reads as follows (R. 133a–134a):

> The parties will consult with each other concerning the schools or other educational institutions which the children or either of them shall attend, but the control and ultimate decision with respect to schools or such other educational institutions shall rest with the Husband. In the event that the Husband decides to send the children to private schools, he shall pay, in addition to all other payments herein provided for, the full cost and expense thereby involved, including the charges made for tuition, books, necessary traveling expenses and for board and lodging if the children reside away from their home. The Wife shall be under no obligation to pay any part of the expense of sending the children to private schools unless she receives funds, from the Husband or any other person, specifically designated for that purpose.

Subparagraph (h) deals with payments for summer vacations for the children. If the husband's net income exceeded $18,000 he was obligated to pay up to $1,000 of the cost of the children's vacation determined on by the wife. If he voluntarily sent them to camp or otherwise paid for the summer vacation, the sums so paid were not deductible from other payments due the wife. (R. 134a.)

By subparagraph (i) the husband agreed to pay all necessary expenses for the medical and dental treatment of the wife and children. Subparagraph (j) reads as follows (R. 135a):

> There shall be no revision in the payments herein provided for to be made to the Wife by reason of the death or majority of the children or either of them or by reason of the fact that they then no longer reside with the Wife, provided, however, that if, after any child attains the age of twenty-three years and the Husband shall so request in writing, the Wife shall make no further contribution to the support of said child, but may continue to furnish board and lodging to said child. If the Wife, notwithstanding such written request by the Husband, continues to make payments to any such child for his support, the payments herein provided to be made by the Husband to the Wife shall be reduced by 50%.

Article Fourteenth reads in relevant part as follows (R. 135a–136a):

> Upon the remarriage of the Wife, irrespective of the validity of such remarriage, all the provisions hereinabove in Article "Thirteenth" contained shall cease and determine and be of no further force or effect, and in place of said provisions of said Article, the parties agree as follows:
>
> (a) The Husband shall pay to the Wife, for the support, maintenance and education of the children, the sum of $400 a month so long as such children shall continue to reside with said Wife.

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(b) In the event of the death or marriage of either child, or in the event either child no longer resides with the Wife, said payments shall be reduced by $200 per month for each such child.

* * * * *

(d) The Husband shall continue to pay for the medical care of the children as set forth in subdivision (i) of Article "Thirteenth" but shall be under no obligation for the medical care and expenses of the Wife.

(e) The provisions of subdivision (g) of Article "Thirteenth" shall continue in full force and effect.

Subparagraph (f) deals with the circumstances under which the husband shall pay part of the summer vacation costs of the children. (R. 136a–137a.)

The Tax Court, reading the agreement as a whole (R. 27a–32a), with particular reference to Article Fourteenth (R. 32a), construed it as fixing a sum, namely 50 per cent, as payable for the support of the minor children. The Court of Appeals disagreed. It held that sums are payable for the support of minor children when their use is restricted to that purpose only, and found no such restriction here, where the terms of the instrument contemplate a continuance of the payments to the wife after she had ceased to support the children. (Pet. App. 21.) Reading the agreement as a whole, with particular reference to that provision of Article 13 (j) which provides that there shall be no revision in the payments to the wife by reason of the death or majority of the children or if they no longer reside with her, the Court of Appeals

construed the agreement as not fixing a sum payable for the support of the minor children.[1]

ARGUMENT

1. Prior to 1942, alimony payments were not includible in the taxable income of the wife nor deductible by the husband. In 1942, the Internal Revenue Code of 1939 was amended[2] to provide in Section 22 (k) for inclusion in the wife's income of periodic payments made pursuant to a decree or under a written instrument incident to divorce or separation, and under Section 23 (u) for deduction of such payments by the husband. Section 22 (k), however, does not apply "to that part of any such periodic payment which the terms of the decree or written instrument fix * * * as a sum which is payable for the support of minor children of such husband," that amount not being includible in the taxable income of the wife nor deductible by the husband. It is the applicability of this exception which is in question here.

---

[1] The cases of Charles Weil and of Beulah Weil were consolidated in the Tax Court and in the Court of Appeals. The Commissioner, having made inconsistent determinations in order to protect the revenue, supported the decision of the Tax Court in the Court of Appeals as a reasonable construction of the agreement, but filed a protective appeal in the wife's case. The present petition for certiorari is filed by the wife from the reversal on the latter appeal.

A second issue dealt with the deductibility by the husband of certain insurance premiums paid by him pursuant to the agreement. The Tax Court held them not deductible (R. 24a–26a), and on this issue the Court of Appeals affirmed the Tax Court (R. 146a–147a).

[2] Section 120, Revenue Act of 1942, c. 619, 56 Stat. 798.

Whether an agreement incident to a divorce fixes a portion of the amounts payable by the husband to the wife as payable for the support of minor children, within the purview of Section 22 (k), necessarily depends upon the particular terms of the agreement, read as a whole. Both courts below were in agreement on this score (R. 28a, Pet. App. 23), but differed as to the construction to be placed upon the agreement as a whole, each emphasizing different provisions. While we believe that the Tax Court's interpretation is a reasonable one, and so contended in the court below, it cannot be said that the interpretation adopted by the Court of Appeals is not also a permissible one. Certainly the issue presented, turning as it does upon the construction of the terms of a particular agreement, is not of sufficient importance to warrant further review by this Court.

2. The instant case is distinguishable from *Budd* v. *Commissioner*, 7 T. C. 413, affirmed, 177 F. 2d 198 (C. A. 6th), and *Mandel* v. *Commissioner*, 185 F. 2d 50 (C. A. 7th), upon which petitioner relies for conflict. (Pet. 8–9.) While the agreements there involved contained provisions similar to those which the Tax Court in this case construed as fixing sums payable for the support of the minor children, particularly the clauses calling for cutting off payments for the wife upon her remarriage but continuing payments for the children, they did not contain provisions comparable to Article 13 (j) of the present agreement which specifically states that there shall be no reduction in the payments to the wife in the event of the death of a child. On the contrary, in both the

Budd (7 T. C., p. 415) and the *Mandel* (185 F. 2d, p. 51) cases there were specific provisions for reduction of the payments in the event of the death of a child.

Similarly, the agreements involved in the Tax Court cases cited in the petition (Pet. 10) contained no specific provision for continuance without reduction of the payments to the wife in the event of the death of a child, as does the present agreement. While there is language in the opinion of the Court of Appeals indicating its disapproval of prior Tax Court decisions, the opinion concludes by adopting the view of that and other courts that the instrument "must be read as a whole" and that "no particular formula" is necessary. (Pet. 23.) In reading the instant agreement, the Court of Appeals simply gave greater weight to the provisions of Article 13 (j), and less weight to the other provisions of the agreement, than did the Tax Court.

3. The issue here presented is not likely to be a continuing one, since it arises only because the terms of the agreement here involved are ambiguous with respect to payments for the support of minor children. The agreement was entered into in 1940, two years prior to the addition to the 1939 Code of Sections 22 (k) and 23 (u), which made the terms of a separation agreement incident to a divorce significant for tax purposes. Since the enactment of those sections, carried forward in Sections 71 and 215 of the Internal Revenue Code of 1954, separating spouses and their counsel have been apprised of the importance tax-wise of the terms of a separation

agreement relative to the support of minor children. Agreements entered into after 1942 presumably have been drafted in the light of the statutory amendments, and should therefore unequivocally reflect the intent of the parties.

CONCLUSION

The decision below is not in direct conflict with the decision of another Court of Appeals; it turns on the interpretation of a particular agreement; and it presents no problem of continuing importance in the administration of the tax laws. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * * *

(k) [as added by Section 120, Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

* * * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

* * * * *

(u) [as added by Section 120, Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22 (k), amounts includible under Section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22 (k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22 (k)–1 [as amended by T. D. 5425, 1945 Cum. Bull. 10]. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—

* * * * *

(d) *Payments for support of minor children.*—Section 22 (k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22 (k), is specifically designated as a sum payable for the support of minor children of the husband. The statute prescribes the treatment in cases where an amount or portion is so fixed but the amount of any periodic payment is less than the amount of the periodic payment specified to be made. In such cases, to the extent of the amount which would be payable for the support of such children out of the originally specified periodic payment, such periodic payment is considered a payment for such support. For example, if the husband is by terms of the decree required to pay $200

a month to his divorced wife, $100 of which is designated by the decree to be for the support of their minor children, and the husband pays only $150 to his wife, $100 is nevertheless considered to be a payment by the husband for the support of the children. If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in section 22 (k). Except in cases of a designated amount or portion for the support of the husband's minor children, periodic payments described in section 22 (k) received by the wife for herself and any other person or persons are includible in whole in the wife's income, whether or not the amount or portion for such other person or persons is designated.

* * * * *

SEC. 29.23 (u)–1. *Periodic Alimony Payments.*—A deduction is allowable under section 23 (u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22 (k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22 (k)–1. (For definition of husband and wife in such cases, see section 3797 (a) (17).)

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1957

FILED
MAY 2 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 871

BEULAH WEIL,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

This petitioner would not sue for the writ if the question were, as respondent writes on his page 2, whether a separation agreement had been properly construed.

The question was, and is, solely on the construction of the statute (Revenue Code of 1939, section 22k, petitioner's appendix A, pp. 13-15); and the Circuits differ in their construction, as we have shown at pages 8-10 of our petition.

Thus, in the case at bar, Judge Medina writes (pp. 16-23, Appendix B of petition), among other pronouncements on statutory construction, the following:

> "The cases construing and applying the terms of the statute have been numerous. * * * the Tax Court seems gradually to have drifted into a series of deci-

sions, including the one at bar, which conclude that a particular agreement does 'fix' sums 'payable for the support of minor children,' when it plainly does not." (Appendix B, p. 20)

"The key words of the statute are 'payable for.' • • • The statute • • • does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes." (Appendix B, pp. 20-21)

• • •

"We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein." (Appendix B, p. 21—Italics ours)

This is believed to be contrary to the holding in *Mandel* v. *Commissioner* and *Budd* v. *Commissioner*, by the Courts of Appeal respectively of the Seventh and Sixth Circuits (our petition, p. 8). The defect inherent in its strict construction is that, if the amount allotted to the child's support does not precisely meet that need, any excess is a problem involving either conversion by the wife or perversion of the agreement.

To cap our assertion that only a matter of statutory construction is involved, Judge Medina, after his declaration of the statutory meaning, writes (p. 22 of Appendix B):

"We *now* turn to the agreement to see whether, *in the light of the principles just stated*, its terms fix any amount as payable for the support of minor children." (Italics ours)

The question is, therefore, not of what one agreement means—"no problem of continuing importance" (Respondent's p. 12)—but what Congress meant. Construction of the agreement, that is, application to it of the ascertained law, and of the separate clauses to which respondent adverts (Respondent's pp. 10-11), is, we submit, for the appeal and not for this application.

Nor is it valid to assert (Respondent's pp. 11-12) that, a new tax law having been enacted, the matter of construction of the 1939 statute, as amended in 1942, is no longer important. It remains important to know whether the 1954 sections (71 and 215a, Petitioner's Appendix C., pp. 24-5) in practically the same language as the earlier texts, are to be so strictly construed as to be essentially impracticable or to be considered as the Sixth and Seventh Circuits have construed them.

It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

Dated: New York, N. Y., April 30, 1957.

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